

(1982) 02 AHC CK 0098

Allahabad High Court

Case No: Criminal Appeal No. 2727 of 1977

Naubat

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision: Feb. 16, 1982**Acts Referred:**

- Penal Code, 1860 (IPC) - Section 304, 34

Citation: (1982) 6 ACR 422**Hon'ble Judges:** N.N. Sharma, J**Bench:** Single Bench**Advocate:** Virendra Saran and P.N. Misra, for the Appellant;**Final Decision:** Allowed

Judgement

N.N. Sharma, J.

Naubat, son of Kawal, resident of village Nagla Dalloo, police station Bilso, district Badaun aged about 35 years has filed this appeal against his conviction u/s 304 Part I of Indian Penal Code by Sri V.S. Agarwal, learned II Addl. Sessions Judge, Badaun in Sessions Trial No. 396 of 1976 dated 16-11-1977. Appellant was sentenced to five years R. I.

2. Prosecution story briefly stated is that of the night of 23rd June, 1975 at about 8 P. M. Mohammad (PW 1) along with victim Nanhoo his maternal uncle had gone to commit theft of beam of persian wheel of Naubat. While they were removing beam from the well, they were intercepted by Appellant and Sukhram, who were armed with Gandasa fixed in lathis and Salig and Asha, who were armed with lathis. They belaboured Nanhoo and Mohammad. Mohammad managed to escape but Nanhoo was beaten to death. His dead body was found lying uncared for by Chunnu Khan, Watchman (PW 5) on the bank of river Bhainsar. He reached house of Nanhoo Khan but none was available there and so he went to police station Bilsa, where he lodged report Ext. Ka. 2 which was scribed by Head Constable Ram Charan Lal (PW 6) on

24-6-76 at 9.15 A. M. Distance of police station from scene of occurrence was two miles. None was nominated in this report. Case was registered in General Diary vide Ext. Ka. 3.

3. Sri Chandan Singh Bist (PW 8) took up investigation of the case visited the spot and seized dead body and sent it for autopsy through constable Asghar and Jagannath Singh. Witnesses were interrogated and site plan Ext. Ka. 8 was drawn Site plan of the well from where beam was being removed was also prepared by him. It is Ext. Ka 9. Some nails of the beam were found loose. Mohammad was sent for medical examination; he was examined by Dr. Sarvesh Chandra (PW 7) on 24-6-75 at 7 P.M. Following injuries were detected on his person:

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4. Injury No. 4 under observation. Advised X-Ray (rt) hand rest simple, about one day back, caused by blunt object, vide injury report Ext. Ka. 4 proved by doctor, who opined that aforesaid injuries were sustainable on the mid night of 23rd June, 1975 at 8 P. M.

5. Autopsy was held by Dr. V. K. Chopra (PW 4) on body of Nanhoo Khan on 26-6-75 at 8.15 A. M. Result is as below;

Probable age of the deceased was about 58 years.

Probable time of death was about 1-1/2 day.

Following ante mortem injuries were detected.

1. Incised wound 4 cm. x 3 cm. x muscle deep on the right cheek.
2. Incised wound 4 cm. x 2 cm. muscle deep back of right elbow.
3. Incised wound 7 cm x 4 cm bone deep on the middle of occipital region with bone cut.
4. Incised wound 6 cm x 3 cm muscle deep left parital region 8 cm above the left ear.
5. incised wound 4 cm. x 2 cm. x bona deep on the middle of forehead bone cut.
6. Incised wound 5 cm x 2 cm x bone on the right temporal region just above the right ear.

Temporal bone cut.

7. Incised wound 6 cm x 3 cm muscle deep on right parietal region 5 cm. above injury No. 6.

6. On internal examination doctor found scalp and skull bones cut and fracture of right side. Membranes were found cut. Death was due to shock and haemorrhage as a result of above injuries, vide post mortem report Ext. Ka. I proved by doctor (PW

- 4) who found that victim might have met his death on 23-6-75 at 8 A.M. Margin of four to six hours in aforesaid duration of death was possible. Victim must have taken his last meal four to six hours prior to death.
7. On completion of investigation Appellant and his co-accused except Sukh Ram were sent up.
8. Appellant denied his participation in the occurrence; he further denied to have dealt any blow with Gandasa on victim.
9. Prosecution examined 8 witnesses in support of their case. Incriminating evidence on record consisted of statements of Mohammad (PW 1), Iddu (PW 2) and Dori Lal (PW 3) Out of these witnesses, Dori Lal turned hostile. Mohammad (PW 1) and Iddu (PW 2) supported prosecution case which was believed by learned trial Judge who received conviction and sentence of Appellant while acquitting the co-accused on the ground that they did not exceed right of private defence of property while dealing blows on Mohammad.
10. Aggrieved by this decision, Appellant has filed this appeal.
11. I have heard learned Counsel for parties and perused record.
12. First contention put forward on behalf of Appellant was that ocular testimony in this case was unreliable. Mohammad (PW 1), who is star witness, testified that on that evening he alongwith his maternal uncle had gone to commit theft of the beam of persian wheel of Naubat. Sukhram, Naubat and Salig arrived from west. Sukhram and Naubat were armed with Gandasa. Gandasas were fixed in lathis. Salig and Asha were armed with lathis. All of them showered blows on them. He further testified that he fell down of lathi blows and again got up and ran away. Assailants went on beating Nanhoo.
13. It was pointed out that testimony of this witness has to be taken with grain of salt. He did not lodge report about the matter and got his injuries examined after about 24 hours. He himself conceded to be a thief.
14. He conceded that before Investigator, he did not mention about Appellant being armed with a Kanta and so could not explain away as to why Kanta was assigned to Appellant according to his statement recorded by Investigator.
15. In para 14 of his statement he alleged that all the four assailants belaboured him and thereafter they belaboured Nanhoo. He ran away and could not tell number of blows dealt on Nanhoo by assailants. Thus, he did not see Nanhoo being belaboured by assailants and it was simply his conjecture that Appellant and his associates dealt blows on Nanhoo. Autopsy shows that not a single lathi blow was sustained by Nanhoo and so allegations of witness that Salig and Asha also dealt lathi blows on Nanhoo alongwith Naubat and Sukhram seems to be a figment of his imagination only.

16. Iddu (PW 2) claimed to have witnessed the occurrence on that night from a distance. He simply heard sound of blows but could not particularise the role of each assailant. In examination-in-chief he alleged that all four assailants arrived from the side of Nagla when Mohammad and Nanhoo were removing beam. He left spot at the inception of assault. He did not know if any one had expired. Thereafter he went to the house of his father-in-law. Learned trial Judge pointed out that witness was an accused in the theft case and a police witness in the case of Anand Pal; he had a dispute with Naubat Appellant also in connection with an onion deal. However, learned trial Judge did not discard his testimony on this ground of enmity of witness with Naubat nor on the ground that Iddu was a chance witness.

17. Thus, there is hardly any evidence on record to show number of blows dealt by Appellant. There is nothing authentic about the role of Appellant in this crime. Mere fact that Appellant was armed with a Gandasa and might have dealt one or two blows on Nanhoo could not justify the inference that he exceeded right of private defence of property available to him. In the absence of Sukh Ram, it is not possible to hold that fatal injuries on victim were dealt by Appellant and not by Sukhram. In a criminal case accused is entitled to the benefit of every reasonable doubt. It is not possible to record conviction with the aid of Section 34 of Indian Penal Code, as has been done by learned trial Judge. The point is well covered by Ram Autar v. State AIR 1954 All. 772, where it was observed, "Persons who are asserting their right of private defence of property are doing a perfectly legitimate act and the assembly is not an unlawful assembly. Consequently the provisions of S. 149 IPC, cannot be invoked so as to make every one of these persons vicariously liable for the acts of their comrades. If any one of them exceeds that right and gives a blow which causes death that is his individual act and he alone would be liable for the consequences thereof. If there is no evidence whatsoever to fix the identity of the individual who delivered that blow the result would be that no one of these persons could be convicted of an offence u/s 304.

18. Similarly as regards the grievous hurt and simple hurt caused, apart from the fact that the causing of them is legitimate in the exercise of the right of private defence, in the absence of evidence as to who caused the hurts, there can be no presumption that lathi wielded by every one of the Appellants must have necessarily struck one or the other of the injured persons on the complainant's side. As those who did not hit any one committed no offence every one is entitled to the benefit of doubt.

19. So, in view of the aforesaid authority benefit of reasonable doubt is extended to the Appellant also.

20. No other point was argued before me.

21. In the result, appeal is allowed. Conviction and sentence recorded by learned trial Judge are set aside. Appellant is acquitted of the offence u/s 304 Part I of Indian

Penal Code. Appellant is on bail. He need not surrender to his bail bonds, which are discharged.